



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case No.: 11852/2015

In the matter between:

H. D.	APPLICANT
and	
R. D.	1ST RESPONDENT
G. G.	2ND RESPONDENT
S. C.	3RD RESPONDENT
REGISTRAR OF DEEDS, KZN	4TH RESPONDENT
REGISTRAR OF CLOSE CPRPORATIONS	5TH RESPONDENT
RAM'S CHAIRS CC	6TH RESPONDENT
SUYACOPHELELA CC	7TH RESPONDENT

J U D G M E N T

CHETTY J :

1. This is an application in which the applicant, the estranged spouse of the first respondent, has brought an application seeking the first respondent's committal to prison, periodically, on the grounds of his contempt of an order requiring him to pay maintenance to the applicant and her minor child of R10, 000 per month, pendent lite. This order was granted by Madam Justice Balton on 13 February

2013. In terms of the second order in respect of which the applicant alleges the first respondent is in contempt, is that granted on 9 May 2013 by Mr Justice Madondo which directed him to pay a contribution to the applicant's costs in the matter in the amount of R165,000.00. It is not in dispute that in respect of the maintenance order granted on 13 February 2013, the first respondent is in arrears in the amount of R 393,500.00. Of the amount related to the payment of the applicant's legal costs, it would appear that only R4000 has been paid to the liquidation of that order since May 2013.

2. The gravamen of the first respondent's opposition to the application to declare him contempt is that he is financially not in a position to comply with either of the orders and that he is in ability to pay the contribution towards costs and maintenance orders are not wilful and or mala fide.
3. The issue to be determined by this court is whether the respondent has placed sufficient evidence before this court to discharge the evidential burden on him in relation to the wilfulness and mala fides in his conduct of failing to satisfy the two orders granted by this court. The onus is on the applicant to prove that the first respondent has had knowledge of the orders and that there has been non-compliance therewith. These aspects are not in dispute in this application inasmuch as the first respondent was legally represented by counsel at the time when both orders, which are the subject of this contempt application, were argued before this court. Subsequent thereto the first respondent has been legally represented throughout and has not raised the service of the orders on him as a ground of opposition. As such the respondent is the evidential burden in relation to the issues of wilfulness and mala fides.
4. It is common cause or not in dispute that the applicant instituted divorce proceedings against the first respondent in 2005 on the basis of he is alleged infidelity. The matter was set on for trial in May 2013 at which time it ran for a pleaded of 10 days. Since then the parties have attempted to settle the matter but to no avail, with both parties claiming that the other had been guilty of making unreasonable demands, rendering the prospect of settlement illusory.

5. It has regrettably become all too common in divorce litigation that allegations are traded back and forth between the spouses with scant regard for the obligation to orders issued by the courts. The legal representatives of the parties appear to do little to cause the parties to act with restraint towards each other, with the result that after significant time passes before the courts are called upon to decide whether a party has acted in wilful defiance of its orders. In the interim, the spouse who has been dependent on the interim maintenance orders and his or her child, have been prejudiced. More importantly, where awards are made in respect of maintenance towards the upkeep and well-being of a minor child born of the marriage, parties often lose sight of the purpose for which such orders have been made. The rights of the child become relegated to matters of secondary or no importance while the battle between the spouses takes centre stage. In this particular matter, whilst the first respondent has not complied with the order in respect of maintenance towards the applicant and their minor child, the affidavits reveal that he has expended various sums towards his child, purchasing items of furniture for him as well as taking him on holidays. As the applicant argues, this does not absolve the first respondent of his responsibility to comply with the orders of this court, and furthermore begs the question as to how he has managed to pay for such holidays, when he has in essence pleaded financial inability to comply with the orders of court.
6. The defence raised by the first respondent will be dealt with in more detail below, save that Mr Fleming, who appeared on behalf of the first respondent, submitted that the purpose of contempt proceedings in such cases is not to secure the committal to prison of the errant party but rather as a means to secure his or her compliance with the order of court. In this regard his submission was that if the first respondent is found to be in contempt and sentence to a period of imprisonment, such committal would offer no prospect of the first respondent being able to pay off the amounts owed to the applicant. On the other hand, if he were not sent to prison, there remains the possibility that the orders could be complied. Mr Fleming relied on the decision in Dezius v Dezius 2006 (6) SA 395 (T) where Patel J carried out an extensive overview of

foreign and local jurisprudence on the origins of contempt. In particular the court noted the following :

Lord Ormrod in *Ansah v Ansah* [1977] 2 All ER 638 (CA) aptly alluded that:

“Such a breach or breaches of an injunction in the circumstances of such a case as this do not justify the making of a committal order, suspended or otherwise. Breach of such an order is, perhaps unfortunately, called contempt of court, the conventional remedy for which is a summons for committal. But the real purpose of bringing the matter back to the court, in most cases, is not so much to punish the disobedience, as to secure compliance with the order in the future. It will often be wiser to bring the matter before the court again for further direction before applying for a committal order. Committal orders are remedies of last resort; in family cases they should be the very last resort. They are likely to damage complainant spouses almost as much as offending spouses. . . .’

7. The Court in *Dezius* noted that an offender should not be deprived of his liberty without procedural fairness and safeguards, and only after conclusive proof has been established disobedience of the court order in question. It follows therefore that where the deprivation of liberty is the relief sought by the party seeking a contempt order, the facts in the matter must be closely scrutinised. It bears noting that the converse of this argument, and one relied on by Mr Haasbroek who appeared for the applicant, was that echoed by Mokgoro J in Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae) 2003 (2) SA 363 (CC) (2003 (2) BCLR 111) 11 noting the following :

‘Systemic failures to enforce maintenance orders have a negative impact on the rule of law. The courts are there to ensure that the rights of all are protected. The Judiciary must endeavour to secure for vulnerable children and disempowered women their small but life-sustaining legal entitlements. If court orders are habitually evaded and defied with relative impunity, the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those most dependent on the law.’

8. By way of background it is important to note that prior to the two orders in respect of which it is contended that the first respondent is in contempt of, the applicant brought to applications in terms of rule 43, being on 26 August 2005 and 15 November 2010 respectively. In respect of the first mentioned order,

Hugo J ordered the respondent to pay the applicant maintenance in respect of herself in the amount of R 3500 per month, as well as maintenance for the minor child at the rate of R 1000 per month, and a contribution towards the applicant's legal costs in the amount of R 7500. In respect of the second order, Jappie J (as he then was) granted an order directing the respondent to pay maintenance to the applicant for herself and the minor child *pendent lite* in the amount of R7500, a month as from 7 December 2010. In addition the court ordered the respondent to pay a contribution towards the applicant's costs in the amount of R7500.

9. In terms of the schedule of maintenance payments made and those owing, which is attached to the applicant's founding papers, it appears that the first respondent made payment between June 2013 and November 2013 in respect of the maintenance obligations, in the total amount of R16 500. For the same period, the first respondent paid a total of R4000 in respect of his contribution towards the applicants legal costs, being the total of R 165 000.
10. In light of the applicants legal costs begin to escalate as a result of the protracted divorce proceedings, she wrote to further applications in terms of rule 43 and was granted the orders which form the subject matter of the contempt application. Both parties in their respective affidavits have alleged that the other's legal costs have escalated to enormous proportions. According to the applicant even at the time when the orders in February 2013 and May 2013 were granted by Balton J and Madondo J, the respondent on each occasion had pleaded that he was financially unable to comply with the orders granted at that stage. Despite this plea of 'poverty', the court granted the orders in respect of which it is alleged that the applicant is in contempt.
11. According to the applicant apart from the paltry payments made by the first respondent as set out above, the first respondent has resolutely failed to obey the orders of this court and whilst she alleges that he has continued to embark on a lifestyle of holidays and a high standard of living, both of which are denied

by the first respondent, the applicant is compelled to eke out an existence for herself and her minor son.

12. In substantiation of her contention that the first respondent has embarked on a stratagem to prolong the divorce proceedings for as long as possible in an attempt to wear her down, the applicant points out that she has not had the necessary injection of legal funds to allow for her representatives to set the matter down for continuation of the trial. It would appear that both parties certainly cannot restore they manage, and that their dispute with each other would relate primarily to the assets in the joint estate. The applicant however points out that the first respondent is clearly in a better financial position to set the matter down for trial, but he has not seen it fit to do so.
13. As regards the allegations of his lavish lifestyle, the applicant alleges that the first respondent has purchased a new vehicle for his current partner, the third respondent. In addition the founding papers contain averments of the first respondent having hosted a birthday party for his minor son at his house, indicative that he has sufficient funds to pay for a party but not to comply with his obligation to pay maintenance. The same sentiments are expressed in relation to a near the lounge suite purchased by the first respondent for his son, as well as having taken the matter for a holiday to Johannesburg in 2014. The applicant further alleges that the first and third respondents embarked on a luxury holiday to the Maldives in June 2014 as well as a holiday to Cape Town in January 2015 and an overseas trip with his son to Disney World in October 2015.
14. In respect of the various holiday trips referred to above, the first respondent denies that such holidays were paid by him personally except that in relation to the expenses pertaining to his son, the first respondent concedes that some of these expenses were paid using his credit card.
15. The applicant further alleges that the first respondent has carried out extensive structural improvements to their matrimonial home, which she estimates to be

in the region of R 350,000. In response the first respondent denies the estimates averred by the applicant, but concedes having undertaking various alterations to the home of the parties. Despite a dispute as to how often the first respondent continues to live in the matrimonial home, it was common cause that on till recently the stepped over at the matrimonial house on possibly two nights per week. Recently prior to the present hearing, the first respondent moved out from the matrimonial home due to the illness of his mother, and now lives with her. It is also not disputed by the first respondent that he operates his business from part of the matrimonial home.

16. In reply the first respondent concedes that he occupies part of the matrimonial home, from which he operates his business. He further contends that while he may not have complied orders in respect of payment for maintenance and contribution towards costs, he has however paid the water lights and revenue goals in respect of the matrimonial home, from which the applicant and her minor child have divide benefit. To that extent the first respondent has argued that he is failure to pay the amounts as per the two contested orders of this court, is not awful or mala fide, , and accordingly that he cannot be found to be contempt of court on that basis.
17. In light of the first respondent's failure to pay maintenance *pendent lite* and towards the contribution of her legal costs, the applicant submits that the first respondent should be found in contempt and should be directed to serve a period of imprisonment in the form of periodical imprisonment as he can well afford to pay the amounts of maintenance ordered by this court, but that he steadfastly refuses to do so.
18. When the matter came before me on 23 September 2016 Mr Flemming moved an application for the admission of a supplementary answering affidavit. The application was issued on 15 September 2016, and served on the applicant's attorney on the same date. This was two weeks before the hearing on the matter on the opposed roll. Counsel for the applicant opposed the introduction of the answering affidavit despite the applicant having already prepared a reply thereto. To that end, Mr Haasbroek for the applicant conceded that even if I

allowed the introduction of the affidavit, the applicant would not be prejudiced in that the matter could still proceed without the need for the matter to be adjourned. The fact that the applicant's counsel were prepared to proceed with the matter is only but one aspect of the enquiry as to whether I should, in the exercise of my discretion, permit the introduction of an affidavit at this late stage. Of equal importance is the opportunity afforded to the Court to have regard to the contents of any replying affidavits from the applicant and the time to be accorded for that purpose. While the applicant's counsel would not be at a disadvantage, it is unfair to the Court to be expected to adjudicate an opposed motion where arguments would be advanced on affidavits to which the Court has not had the opportunity to properly consider.

19. On the face of it, this matter was certified by the applicant's attorney as being ready for the allocation of a date on the opposed roll as far back as 22 March 2016. It is an accepted practice that a court will exercise its discretion in permitting the filing of further affidavits against the backdrop of the fundamental consideration that a matter should be adjudicated upon all the facts relevant to the issues in dispute. See Bader v Weston 1967 (1) SA 134 (C) at 138D; Dickinson v South African General Electric Co (Pty) Ltd 1973 (2) SA 620 (A) at 628F; Cohen NO v Nel 1975 (3) SA 963 (W) at 970B; Dawood v Mahomed 1979 (2) SA 361 (D) at 365H. In James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd) v Simmons NO 1963 (4) SA 656 (A) the Court noted that while the general rules regarding the number of sets and proper sequence of affidavits should ordinarily be observed, some flexibility must necessarily also be permitted. The Court went on at 660E to add that :

"It is in the interests of the administration of justice that the well-known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted. Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking not a right, but an indulgence from the Court: he must both

advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received. Attempted definition of the ambit of a discretion is neither easy nor desirable. In any event, I do not find it necessary to enter upon any recital or evaluation of the various considerations which have guided Provincial Courts in exercising a discretion to admit or reject a late tendered affidavit (see e.g. authorities collated in *Zarug v Parvathie* 1962 (3) SA 872 (N)). It is sufficient for the purposes of this appeal to say that, on any approach to the problem, the adequacy or otherwise of the explanation for the late tendering of the affidavit will always be an important factor in the enquiry.”

See too *Nick’s Fishmonger Holdings (Pty) Ltd v Fish Diner In Bryanston CC* 2009 (5) SA 629 (W) at 641G–642 where the court set out some of the factors to be considered in deciding such an application :

- (a) The reason why the evidence was not produced timeously.
- (b) The degree of materiality of the evidence.
- (c) The possibility that it may have been shaped to ‘relieve the pinch of the shoe’.
- (d) The balance of prejudice to the applicant if the application is refused and the prejudice to the respondent if it is granted.
- (e) The stage which the particular litigation has reached.

20. In his affidavit in which he sets out the basis for the court to allow the admission of his supplementary answering affidavit, the first respondent submits that the information contained in the supplementary answering affidavit would be of assistance to the court as it would show the applicant to have been dishonest in her founding affidavit, and in particular that she is involved in the running of a busy catering enterprise, which facts have been hidden from the court. The first respondent filed her’s answering affidavit in this matter on 13 January 2016. The information which he seeks to place before this court refers to events on five February, six February and 8 February 2016. He also alludes to certain email messages exchange between the applicant and one Keshia Persathan in August 2016, making reference to the applicant having been engaged in certain business activities. In addition, the first respondent attaches copies of the motor

vehicle which the applicant uses, operating under the name of Vernon's Catering and Function hire.

21. The first respondent contends that the applicant will not suffer any prejudice by the introduction of the evidence contained in his supplementary affidavit as all of this evidence is irrefutable. This was certainly not the impression that I gained from the response of the applicants counsel. In any event, the applicant's stance is that the information which the first respondent seeks to place before this court at this late stage is wholly irrelevant to the issue of whether the applicant is in contempt of the orders granted requiring him to pay maintenance for the applicant and the minor child, as well as a contribution towards costs. Having regard to the factors which the court alluded to *James Brown & Hamer (supra)* which the court must have regard to determine whether, in the exercise of its discretion, to admit the introduction of a supplementary affidavit, the first respondent's affidavit is silent as to why he was unable to file this affidavit as soon as he became aware of the facts alluded to by him. There is certainly no explanation as to what factors explain the delay from 8 August to 15 September 2016, assuming that he brought these matters to the attention of his attorney, in the full knowledge that this matter was set down on the opposed roll much earlier in the year, to be heard on 23 September 2016. The first respondent's counsel was unable to provide any response to this enquiry during the course of the hearing. In any event, the matter is alluded to in the supplementary affidavit do not take the enquiry of the court into the first respondent's alleged contempt any further. The first respondent in his answering affidavit filed in January 2016 clearly sets out that he should not be held in contempt as he is unable to comply with the orders of this court because of his dire financial circumstances. In particular, he states at paragraph 27 of his answering affidavit that he is not in a position to make any contribution towards the orders made by this court, and that the applicant on the other hand does not need any assistance

"Given her being flush with money. She pays cash to the sixth respondent (Ram's Chairs cc) four all orders that she placed the sixth respondent. She also uses Vernon's Catering as a front to conduct our business. She was also operating a lucrative catering business under the name of Las Vegas Lighting

and Decor, and on it being brought to her legal representative's attention that we are fully aware of this lucrative business, she ceased using the said name when training."

The supplementary affidavit sought to be introduced therefore introduces nothing new to the opposition by the first respondent to the contempt of Court application. In addition, no special circumstances have been shown to exist justify the introduction of such affidavit.

22. In light of the above I was satisfied that the first respondent had not discharged the onus the onus of establishing that it would be in the interests of justice for the admission of a supplementary answering affidavit. Counsel for the applicant asked that the application for the introduction of the supplementary answering affidavit be dismissed with costs, in as much as it had been obliged to prepare a replying affidavit in response thereto, and at short notice. Mr Fleming on the other hand submitted that if I was inclined to disallow the application, no costs should be awarded. I am of the view that costs should follow the result and the application to introduce the supplementary affidavit is accordingly dismissed with costs.
23. I now proceed to deal with the primary issue in this application, namely whether there is sufficient evidence before me to conclude that the first respondent has acted in wilful disregard for the orders of this court, and acted mala fide, justifying the conclusion that he has been in contempt. The test in contempt proceedings has been definitively dealt with by the Supreme Court of Appeal in the decision of Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 where the Court important noted that

"[8] In the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law."

The test for contempt received the attention of the Constitutional Court in *Pheko & others v Ekurhuleni City*¹ where Nkabinde J said the following:

[28] Contempt of court is understood as the commission of any act or statement that displays disrespect for the authority of the court or its officers acting in an official capacity. This includes acts of contumacy in both senses: wilful disobedience and resistance to lawful court orders. This case deals with the latter, a failure or refusal to comply with an order of court. Wilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence. The object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order

24. The test for contempt was set out by the Court in *Fakie* as the following :

[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and *mala fide*'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith)"

25. The applicant must prove beyond reasonable doubt that the first respondent has not merely disregarded the court order, but has deliberately and intentionally violated the "court's dignity, repute or authority". In her founding affidavit the applicant has detailed the various expenses which the first respondent has incurred, which she refers to as his "lavish spending", which she contends has taken precedence over his compliance with the order is to pay maintenance and the contribution towards her costs. She further submits that she has been unable to bring finality to the issue of her pending divorce because she has not had the financial means to place her attorneys in funds. Her application to the legal aid board for financial assistance was declined by virtue of her share of assets forming part of the joint estate. As a result of the first respondent not complying with court orders she is also fallen in arrears with her credit card payments to Nedbank, who instituted proceedings against.

¹ 2015 (5) SA 600 (CC).

These have been stayed, pending the finalisation of this application. She adduced further evidence of being in arrears with her payments of an account with a clothing store, where she is purchased clothing for her son, daughter and herself. In short, the applicant states that she is unemployed and has no funds or savings to sustain either herself or her child.

26. While the applicant contends that the first respondent has a 30% member's interest in the sixth respondent, Ram's Chairs, the first respondent consistently in here's answering affidavit adopts the position that he is merely employed by Ram's Chairs , as a manager and has nothing to do with the matters of the sixth respondent for almost 2 years. He contends that he earns a salary but has not taken the court into his confidence by producing a salary advice on from which it can be ascertained the extent of his earnings as opposed to his expenses, and he is primary obligation of paying maintenance and the contribution towards the applicant's legal costs. The first respondent further contends that the sixth respondent is under business rescue proceedings. He repeatedly makes reference to this fact and contends that in light thereof he is *"presently still not in a financial position to pay the absurd amounts demanded by the applicant."*
27. Firstly, the first respondent does not say when he will be in a position to satisfy his maintenance obligations as well as that arising from his obligation to contribute towards the applicants costs. The first respondent further appears to adopt the view that the financial imposition placed on him is a demand of the applicant. He, or those representing him, appear not to be fully cognisant that the contempt proceedings arise not from the first respondent's non-compliance with a demand of the applicant but rather from his wilful and delivered non-compliance with two orders of this court. In so far as the reliance on the business rescue proceedings, the first respondent has not put up any documentation to indicate at whose instance the business rescue proceedings were initiated, when, what circumstances led to the business falling on hard time , the identity of the business rescue practitioner, and what plan has been put in place to steer Ram's Chairs out of its financial predicament.

28. In dealing with this attack the first respondent contends that all of this information could have been obtained by the applicant from attorneys Schoerie & Sewgoolam, who he says are business rescue practitioners. I doubt that the attorneys have taken on the mantle of being business rescue practitioners and that more accurately, they may have been the attorneys responsible for the application placing the sixth respondent into business rescue. Notwithstanding, it is no answer from the first respondent, faced with a prospect of imprisonment owing to his contempt of court, to say that the financial information pertaining to the business rescue proceedings could be subpoenaed by the applicant from the attorneys dealing with the matter. He adopts a high-handed approach to the basis of him being supposedly financially impecunious. He simply has not put up any information from which his bona fides can be gauged. One would have expected him to have stated that since the business rescue of the business, there has been a turn-around in its clients and in respect of orders or bookings. His affidavit is silent in this regard. Moreover, I fail to see (on the basis of what is set out in his affidavit) how the business rescue proceedings have adversely affected his salary earnings as an employee. He has not made mention of a cut in his salary or of him having to work short time. To this end, it is reasonable to infer that the business rescue proceedings have had no negative impact on his earning ability. In addition, as an employee, he would have had to receive a copy of the application papers before the business rescue order was granted. He would therefore have been in possession of a copy of the court application or at the very least, have seen a copy thereof. His suggestion that information in this regard should be obtained by the applicant via the attorneys is somewhat arrogant.
29. The contention of the first respondent is that he does not have the means to comply with the maintenance and costs orders of this Court. He goes further in his answering affidavit to state that he is not in a position to make '*any contribution*' towards liquidating his indebtedness in terms of the orders. This suggests that he is in no position now, or at any time in the future, to comply with the orders of this court. This raises the question as to why the first respondent has not sought, to date, to bring an application for the variation of the orders in terms of rule 43(6). The first respondent contends that he has not

been able to bring a variation application because he has not had the financial means to do so. Again, he bears the onus of placing information before the court from which his financial predicament can be interrogated and assessed. He has chosen not to place such information before the court, and as such has not discharged this onus.

30. Mr Fleming conceded that in the absence of a variation of the orders granted by Balton J and Madondo J, the first respondent is obliged to comply therewith, even if he may hold the view that the applicant is not entitled to the maintenance and contribution towards costs. See Culverwell v Beira 1992 (4) SA 490 (W) at 494A – C where it was held that all orders of court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside. This principle was endorsed in Clipsal Australia (Pty) Ltd and Others v GAP Distributors and Others 2010 (2) SA 289 (SCA) para 22 at 298 – 299.
31. The first respondent denies the applicants contentions that he leads a lavish lifestyle, yet is unable to honour his commitments in terms of the orders of court. In response to the allegation that he has treated his current partner, the third respondent, to the indulgences of an outing at a spa yet pleads poverty in relation to the compliance with the orders of court, the third respondent states that the trip to the spa cost R800, which was paid for by the third respondent. He further denies the allegation that he purchased the first respondent a new motor vehicle. This vehicle, a picture of which appears in the applicant's founding papers, with the third respondent standing at its side, according to him, belongs to the third respondent. In relation to the applicant's allegation that he was responsible for throwing an elaborate birthday party for the couples minor son in May 2014, the first respondent denies that the function was extravagant in anyway. Similarly in response to the applicant's allegation that the first respondent contributed an amount of R47,712 towards the cost of his daughter's wedding expenses, the first respondent admits to having done so but states that he borrowed the money and points out that it was a fraction of the amount paid by the applicant towards the wedding. Counsel for the applicant was quick to point out that the applicant's contribution towards her daughter's wedding was immaterial in the context of this application in as much

as it is the first respondent's alleged to be in contempt of the court orders, and it is he who has pleaded a financial inability to comply there with. It was further submitted that the first respondent's plea of poverty cannot be bona fide as he has the means of borrowing money in order to satisfy certain obligations, but is unable to adopt the same approach in order to comply with the obligation to pay his maintenance. Similarly, in response to the allegation of him having purchased a lounge suite for his son for his birthday, the first respondent denies this and attributes the lounge suite as a gift from his mother.

32. The applicant further allege that in June 2014 the first and third respondents embarked on a lavish holiday to the Maldives, which the applicant believes was paid for by the first respondent. The letter denies the allegation contending that the trip was paid for by the third respondent. Similarly in relation to a holiday to Cape Town in January 2015, the first respondent admits having gone on the holiday but contends that this was paid for by friends of his. Yet again in October 2015 the first respondent took his son on a trip to Disney World in Florida and contends that the trip was funded by virtue of his sons savings and the use of a credit card. Despite here's contention that the trip did not cost more than R60 000, the first respondent fails to explain to the court what part of these expenses in respect of the overseas trip were paid by him, and what part were paid by his sons savings. Fact that he may have stayed in fairly modest accommodation is immaterial. The point made by Mr Haasbroek for the applicant is that the first respondent has the means to access financial assistance for the purpose of holidays or to contribute towards his daughter's wedding (as laudable as this may appear), yet he is unable to comply with his obligations of paying maintenance towards his spouse and their minor child as well as contributing towards her legal costs.
33. In respect of the allegation of him having spent over R113 000 on alterations and improvements to the natural on your home, the first respondent challenges the correctness of the amounts spent on the automation but does not deny that the alterations have been carried out. He accuses the applicant of grossly exaggerating the amount spent on the alterations and takes issue with her raising this matter, contending that he had carried out the alterations because

of her kitchen being in a dilapidated condition. The first respondent contends that much of the improvements were carried out by himself and his son and that much of the material was paid for using his credit card, for which he is billed on a monthly basis. The applicant contends that these alterations have been undertaken because the first respondent carries out his business operations from the matrimonial home, and secondly because the first respondent harbours plans to purchase how a half share of the matrimonial property. Even in the face of a denial of these allegations by the first respondent, the point remains that he has seen it fit to carry out alterations to the property yet is unable to find the financial means to comply with the orders of court. Importantly, he does not take the court into his confidence to state exactly how much he spent on the alterations, and how these expenses were funded. The same applies to the first respondent's installation of new carpets in part of the house. The differential in price between what the applicant contends the carpets costs as opposed to the version of the first respondent is immaterial. The fact of the matter is that he is able to afford incidental expenses such as paying approximately R5000 for carpeting it is unable to find the financial means to comply with the court orders.

34. During the course of the hearing, Mr Fleming placed much emphasis on the fact that the first respondent purchased groceries and paid for the utilities on a monthly basis at the matrimonial home. Such payments were not part of the first respondent's maintenance obligations, but nonetheless were of beneficial value to the applicant and the minor child. Counsel relied heavily on paragraph [9] of the dictum in *Fakie* where Cameron JA stated

[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and *mala fide*'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).

35. In light of the views expressed in para [9] of *Fakie* counsel submitted that the first respondent was paying for amounts in respect of which he was under no legal obligation, but did so to ensure that he is wife and minor child would not destitute and unable to afford the necessities of water and electricity. On the other hand, counsel for the applicant dismissed this explanation contending that the only reason for the first respondent paying for the utilities is because his business operates from part of the marital home. In the event that the electricity to the house was cut off, this would directly impinge on the first respondent's ability to carry out his business. It was therefore submitted that here's payment of the utilities should not be seen as an act of benevolence towards the applicant and his minor child but rather for the self-centred purpose of ensuring the continued operation of his business.
36. The first respondent seeks refuge behind paragraph [9] of *Fakie* for the contention that even though he may not have complied with the court orders, his conduct as evidenced by the payment of the utilities account at the matrimonial home, does not constitute evidence beyond reasonable doubt of a deliberate and intentional violation of the "court's dignity, repute or authority". I am not convinced by the soundness of the first respondent's argument. On the contrary the first respondent has chosen to be somewhat economical with regard to placing sufficient facts before the court with regard to his financial circumstances. While he contends that the business of the sixth respondent has deteriorated, he fails to provide specifics of the extent of the slump in its business or whether the business of rescue proceedings have yielded any positive outcome. The fact that he may have approached the banks for assistance, which was unsuccessful, does not remedy his non-compliance. The first respondent adopts a confrontational attitude towards the compliance of the court orders, which appears from his answering affidavit where he says the following at paragraph 30.2 :
- "... This is aggravated by these intermittent applications launched by the applicant at her own whims and fancies. *The more the court orders me to pay, the less opportunity I will have to comply therewith.*"

37. While he complains of his inability to make payment as taking an emotional and psychological strain on him, he continues to enjoy spa treatments, holidays both locally and overseas, while his maintenance obligations and that of a contribution towards the applicant's costs, remained unfulfilled. Having regard to the facts placed before me, I am satisfied that the applicant has succeeded in proving beyond reasonable doubt that the first respondent's conduct in failing to comply with the orders of this court are both wilful and mala fide. I accordingly conclude that the applicant has satisfied the test for this court to find the first respondent to be in contempt.

38. In so far as the relief which the applicant seeks, being that of the imprisonment of the first respondent, periodically for a period of 30 days, to be served from 17h00 on a Friday until 07h00 on a Monday, counsel for the first respondent submitted that such imprisonment would serve no purpose unless it can bring about a change in the first respondent's financial circumstances or payment of the amount which he owes in respect of the two court orders. The constitutional court in *Pheko* at paragraph [28] stated

The object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order."

It added at paragraph 30 that

Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour.

39. Counsel for the applicant however submitted that committal of the first respondent to imprisonment is justified in the circumstances of this matter where the first respondent has simply been contemptuous in his approach to the orders of this court. As set out earlier, his payments towards compliance with the court orders is reflective of anything but someone who shows respect to the honouring of his obligations towards his manager and spouse, despite the fact that they are in the process of a protracted divorce. It has been held

that although money judgments cannot ordinarily be enforced by contempt proceedings, 'it is well established that maintenance orders are in a special category in which such relief is competent': *Bannatyne (supra)* at para [18].

40. Counsel for the first respondent further urged me to take into account that the first respondent's business is probably at its busiest during the periods for which the appellant seeks that he be periodically committed to imprisonment. On the other hand, on the first respondent's own version, he talks of a slump in the business of the first respondent and on the facts before me, there is nothing to indicate what precisely are the first respondent's duties with the first respondent, whether he works alone or in conjunction with others, and whether he is responsible for attending to clients' needs at night or over weekends. Again, this court is faced with a paucity of information from the first respondent. Moreover, to the extent that the spectre of committal to prison would bring about a payment of the outstanding amounts in respect of maintenance and the contribution towards costs, counsel for the first respondent submitted that it would be impossible for the first respondent to raise such amounts within a relatively short period of time. In this regard it was submitted that the court should afford the first respondent a reasonable opportunity to do so, even if I were inclined to commit him to jail.
41. In the result, the order I make below is intended not only to secure the rights of the minor child but also the dignity of the applicant will have been without any form of maintenance payments since December 2013, and even for the five months prior thereto, the contributions made by the first respondent had been less than half of the stipulated amounts. At the same time the order affords the first respondent an opportunity to avoid imprisonment. It is therefore in places a balancing of the competing interests of all parties.
42. I make the following order :
 - a. the first respondent is guilty of contempt of the court orders dated 13 February 2013 and 9 May 2013 under case number 4723/2005;

- b. the Sheriff in whose area of jurisdiction the first respondent may be found be and is hereby directed to take the first respondent into custody and committing to periodical imprisonment, for a period of 30 days, such imprisonment to be served from 17h00 on every Friday until 07h00 on Monday thereafter;
- c. that the order contemplated in paragraph (b) above be and is hereby suspended on condition that the first respondent pays the amount of R393,500 in respect of the order dated 13 February 2013 and R161,000 in respect of the outstanding contribution towards cost granted on 9 May 2013, together with interests at 15.5% as from the date when such amounts became due, such payments to be made within 30 (thirty) days of the granting of this order into the trust account of the applicant's attorneys Pravda & Knowles, standard bank – ABC branch, Durban Account number [0....], branch code - 0401 2600.
- d. In the event of the first respondent effecting payment as set out in paragraph (c) then the first respondent is cautioned and discharged.
- e. The first respondent is directed to pay the costs of this application on an attorney and client scale, with the cost of the applicant's opposition to the first respondent's application for the admission of a supplementary answering affidavit to be paid on a party and party basis.

Appearances:

For the Applicant : Adv

Instructed by : Pravda & Knowles Attorneys
320 Anton Lembede
Ref: MP/Kp/01-D389-001-2014
031 307 3982

For the Respondent : **Adv A G Flemming**

Instructed by : Siva Chetty & Company
c/o : Naidoo Maharaj Incorporated
Morningside
Ref: Mr S N Chetty/Chendre/G1868
033 342 9636

Date of Hearing : 23 September 2016

Date of Judgment : 14 November 2016